EXHIBIT C

GSBCA

Appeal of RACON INCORPORATED P. O. Box 7084 Wichita, Kansas 67201

Contract No. GS-07S-21333 Granted in Part

November 24, 1972

Appearance for Appellant

Winton M. Hinkle, Esquire

Weigand, Curfman, Brainerd, Harris & Kaufman

Suite 830, First National Bank

Building

Wichita, Kansas 67202

Appearance for

General Services Administration

Mildred E. V. Pitts

Trial Counsel

Claims and Litigation Division

Office of General Counsel

Washington, D. C.

Opinion by Mr. Williams

This case involves a timely appeal from a Contracting Officer's final decision determining that the Appellant owed the Government $10,629.85 pursuant to the Price Reductions clause of the contract. The parties elected to have the case decided on the available record, which includes the contract, correspondence between Appellant and the Contracting Officer, Appellant's catalogue prices of December 1968, January 1969 and April 1969, as well as a Government audit. Appellant has filed a brief.

Findings of Fact

Appellant's requirements contract calls for the delivery to various General Services Administration (GSA) regions during the period December 1, 1968 through November 30, 1969 of several types of refrigerant gases, including Types R-12 and R-22. On April 1, 1969 and again on June 1, 1969, an industrywide price reduction occurred in the manufacturer's price schedules for sales of R-22 to air-conditioning and refrigeration wholesalers. A similar reduction occurred on June 1, 1969 in the price of R-12. Appellant also reduced its catalogue prices in amounts similar to those previously announced by the other manufacturers who initiated the reduction. Appellant's contract prices for R-12 and R-22 were still substantially below its catalogue prices after these reductions. Other markets for fluorocarbon products were generally unaffected by the reduction.

The contract contains a Price Reductions Clause, Supplemental Provision No. 34, providing in pertinent part:

'34. PRICE REDUCTIONS

(This Price Reductions clause is applicable only to requirements contracts and indefinite quantity contracts.) (a) If at any time after the date of the bid or offer the Contractor makes a general price reduction in the comparable price of any article or service covered by the contract to customers generally, an equivalent price reduction based on similar quantities and/or considerations shall apply to the contract for the duration of the contract period (or until the price is further reduced). Such price reduction shall be effective at the same time and in the same manner as the reduction in the price to customers generally. For purpose of this provision, a 'general price reduction' shall mean any horizontal reduction in the price of an article or service offered (1) to Contractor's customers generally, or (2) in the Contractor's price schedule for the class of customers; i.e., wholesalers, jobbers, retailers, etc., which was used as the basis for bidding on this contract. (For purposes of determining a 'general price reduction' under this clause, sales to States, including the District of Columbia, and other political subdivisions by a Contractor, or reductions in price schedules of the Contractor to such agencies, shall have no application.) An occasional sale at a lower price, or sale of distressed merchandise at a lower price, would not be considered a 'general price reduction' under this provision. The Contractor shall invoice the ordering offices at such reduced prices indicating on the invoice that the reduction its pursuant to the 'Price Reductions' article of the contract provisions. The Contractor, in addition, shall within 10 days of any general price reduction notify the General Services Administration's Contracting Officer of such reduction by letter. Failure to do so may require termination of the contract, as provided in the 'Default' clause of the General Provisions. Upon receipt of any such notice of a general price reduction all ordering offices will be duly notified by the Contracting Officer.'

On March 1, 1972 the Contracting Officer determined that during the term of the contract a general price reduction occurred and that in accordance with the provisions of the Price Reductions clause, there was due and owing to the

Government the sum of $10,629.85. A timely appeal was taken on March 28, 1972 by the Appellant.

The Contracting Officer's decision is based on an auditor's report claiming Government entitlement to a 6.5% contract price reduction for R-22 refrigerant delivered after April 1, 1969 and an additional 1.6% reduction for R-22 delivered after June 1, 1969 because Appellant reduced its catalogue prices by approximately those percentages.

Appellant contends that the revision of certain wholesale price schedules in the spring of 1969 did not effect a general price reduction under this clause because the reduction was not offered to its customers generally, but only to air-conditioning and refrigeration wholesalers (who at the time represented only about 40/45% of Appellant's sales of fluorocarbons). Appellant also manufactures aerosol products for use as a propellant agent, chemicals for use as raw materials, as well as industrial solvents. Since this case concerns only chemicals used for refrigerant purposes, the fact that price reductions were not made on products other than refrigerants is not relevant. Appellant also argues that its price reductions on refrigerant gases were to wholesalers only and that prices on the same gases supplied to refrigerator and air conditioner manufacturers were unaffected. While this may be so, the audit report discloses that there were in fact no sales to manufacturers during the life of this contract. Under such circumstances we find that the price reduction in question was a general price reduction.

Appellant contends that about 85 percent of its gas sales under the contract were deliveries in Government-owned canisters and that such sales have no counterpart in the products offered in Appellant's catalogue listings. We find this to be a fact. The only items remaining for comparison then are those involving sales in contractor-furnished containers. As to these, a detailed review of the contract awarded to Appellant discloses that no award was made for other than refillable containers. We can therefore further narrow our inquiry to exclude all of Appellant's commercial offerings of gas in contractor-furnished disposable containers.

Appellant further urges that its wholesale schedule was not used as a basis for bidding on this contract (see Clause 34). The merit of this contention is readily evident from the following comparison of per-pound prices of refrigerant gas in contractor-furnished refillable containers. All contract prices except as noted are for delivery to all GSA regions called for in the contract. Appellant's catalogue prices were obtained in part from the record and in part by special request of the Board to the Office of Audits and Investigations, GSA Fort Worth field office which furnished catalogue data freely and voluntarily supplied by the Appellant.

	Contract Price to Government	Appellant's Catalog Prices to Others in effect on		
Type Gas Lb.	(per lb.)	12-1-68	4-1-69	6-1-69

	Tank	Item No.				
R-12	25 [FN1]	(9)	$.405 <<dagger>>		$.49	Not available in refillable containers that small
	50	(12)	.320	.47	.47	.455
R-22	22 [FN1]	(25)	.580*	Not shown available in 22 lb.	.76	No quote on ref. 22 lb cyl.
	50	(29)	.430**	.775	.725	.710

FN<<dagger>> Regions 1, 2, 3: $.407
FN* Region 1: .585
FN** Region 1:.435

As is evident from examining the above chart and accompanying footnotes comparability of prices in this appeal must be limited to the furnishing of contract Items 12 and 29, R-12 and R-22 gases in 50-pound contractor-furnished refillable tanks. From the obvious differences between Appellant's catalogue prices and the contract prices shown on the chart we find that Appellant did not use its catalogue price as a basis for bidding on this contract. This conclusion is reinforced by the fact that Appellant's bid price to the Government was already below its costs, at least as regards R-22. This is evidenced by Appellant's letter to the Contracting Officer dated January 17, 1972, which states in pertinent part:

'. . . The average cost per pound of all Refrigerant 22 shipped by Racon Incorporated in 1969 was $.421 which does not include an allowance for selling, general and administrative expenses. The average Refrigerant 22 selling price during the contract period was $.419 . . . ..' (Exh. I, Appeal File.)

The contract bid price to the Government was deliberately placed low for a number of reasons including Racon's need to utilize idle plant facilities. Appellant's attorney made clear the fact that its argument for nonapplication of the Price Reduction clause was in no way based on the fact that Appellant's contract prices were below cost. It is clear then that Appellant's catalogue prices were not the basis for bidding this contract.

Discussion

From a reading of the Price Reductions clause an applicable general price reduction is one which is either made to customers generally, or is a reduction in catalogue prices used as a basis for bidding. Although we have found that

Appellant did not use its catalogue prices as a basis for bidding this contract, we have found that its price reductions in question were general price reductions within the meaning of the clause.

The sole question remaining for determination is whether the general price reductions were on comparable prices. If the Government contract prices are comparable to those wholesale prices shown in our chart and discussed in our findings, then reductions are in order to the extent of the comparability. If they are not comparable then the Price Reductions clause does not apply and the appeal must be granted.

We have already found per-pound prices of gas delivered in Government-owned cylinders not comparable with those for delivery in contractor-owned containers. Similarly we have found prices for delivery in refillable containers non-comparable with those relating to disposable containers. Further, we have been unwilling to hold that per-pound prices on gas delivered in 22-pound cylinders are strictly comparable to those calling for delivery in 25-pound cylinders. Such decision follows our holding in Roxbury Carpet Company, GSBCA 494, May 1, 1961, (unpublished) that the Price Reductions clause cannot be invoked unless the article which was the subject of the commercial price reduction was the same item covered by the GSA contract. We cited Roxbury Carpet with approval in our recent decision in Pennwalt Corporation, GSBCA 3580, 72-1 BCA 9402, in which we defined comparable prices as those for the same product furnished in similar quantities. We reached such interpretation by considering the normal meaning of the words in the context in which they were used (see James E. Rice v. United States, 192 Ct. Cl. 903, 428 F.2d 1311 (1970)) and perceive no sound reason for changing it. We are particularly reluctant to speculate on what the drafters of the Price Reductions clause may have intended when the record before us is devoid of any evidence on the point.

One argument against applying the clause to the facts of this case is that the Government contract prices are so much lower than Appellant's prices to its other customers that the two cannot be considered comparable, especially since applying the general price reductions to the Government contract price would force Appellant to sell its product below cost. We find the argument difficult to apply. First of all, other factors being equal, a manufacturer can normally furnish supplies to the Government at a price below that to other commercial customers. Selling expenses are limited to the costs of bid submission and the orders received on a requirements contract such as this are generally comparable in quantity to larger commercial orders. Second, inherent in the problem of applying any standard of comparability which depends on the degree of price differential between a manufacturer's prices to the Government and its prices to others, is the necessity of drawing the line at some point. In this case Appellant's price to the Government for R-12 gas in 50-pound contractor-owned containers was 32% below its pre-reduction price to other customers, and that for R-22 was 44% below the price to others. We do not find such differentials affect comparability. As a matter of fact the differentials are about the same or a little less than those we approved as comparable in Pennwalt. [FN2] We are also unwilling to conclude that a price reduction clause may only be invoked when no loss would be caused to a contractor. We are not a court of equity. We have no power to reform a contract by declaring inapplicable any clause which might work financial hardship.

The parties entered into a contract in which the Price Reductions clause formed an integral part. We have found no ambiguity in the clause. On the record before us we have found that Appellant granted general price reductions in comparable prices of contract Item 29 on April 1 and June 1, 1969, and of contract Item 12 on June 1, 1969 only. We have found no other general price reductions to have been made on prices comparable to those for any other items called for under this contract.

In summary, credits due the Government should properly have been limited to percentage reductions corresponding to the general price reductions Appellant made to its commercial customers on items identical to contract Items 12 and 29. The June 1, 1969 reduction of the Item 12 commercial price from $.47 to $.455 per pound amounts to a $.015 or 3.19% decrease. Billings to the Government for the 16,150 pounds during the period June 1 through November 30, 1969, the end of the contract period, should have been reduced by a corresponding $.0102 per pound from the contract price of $.32. The proper credit because of the Item 12 reduction is therefore $164.73. On Item 29 the April 1, 1969 commercial price reduction from $.775 to $.725 per pound amounts to $.05 per pound, or 6.45%. Accordingly, the price to the Government of $.430 for delivery to all GSA regions except Region 1 should have been correspondingly reduced by $.0277 per pound, making the Government credit for deliveries of 2,550 pounds during the period April 1 through May 31, 1969, $70.63. The June 1 commercial price decrease to $.710 for the same item amounts to $.065 per pound or 8.38% below the price in effect at the beginning of the contract period. The same percentage reduced from the contract price of $.43 per pound amounts to $.0361 per pound. For the 11,200 pounds involved in the period June 1, 1969 through the end of the contract period on November 30, 1969, an additional credit of $404.32 was due the Government. Although the price to Region 1 was also theoretically affected there were no deliveries there during the April 1 through November 30, 1969 period and therefore no credits are due.

Decision

The appeal is granted to the extent of the Government's claim for $9,990.17 of the $10,629.85 claimed in the Contracting Officer's final decision. The appeal is denied to the extent of $639.68, and the Contracting Officer's decision approved in that amount.

Robert F. Williams, Member

I concur:

David W. Pelkey, Member

2 In Pennwalt the price to the Government for Type-22 gas in contractor's 50- and 125-lb. tanks was similarly 32% and 50% below the contractor's commercial catalogue price before any cuts were made.

Dissenting Opinion by Mr. James

This case involves a timely appeal of the Contracting Officer's final decision determining that Appellant owed the Government $10,629.85, pursuant to a price reduction clause in the contract. The contract called for the delivery of several types of refrigerant gases during the period from December 1, 1968 through November 30, 1969, including two types under dispute which will be referred to as R-12 and R-22. During this period, two industry-wide price reductions were made in these products, one on April 1, 1969 and the other on June 1, 1969. The contract specified that part of the shipment was to be made in Government-owned canisters. The Board, in its majority decision, disallowed that portion of the claim because the prices cited in Appellant's catalogue specified delivery in contractor-owned canisters, which were not considered comparable to deliveries made in Government-owned canisters. I agree with the majority of the Board on this portion of their decision.

The majority of the Board has held that the remaining 15.2% of the refrigerant, which was shipped in contractor-owned cylinders, is subject to the Price Reductions Clause because prices for this service can be compared with catalogue prices. The majority holds that although the contract prices were substantially lower than the catalogue or general market prices during the life of the contract, they are, nevertheless, still subject to the same percentage price reductions that occurred at the general market level. The price of R-22 was reduced 6.5% after April 1, 1969 and 1.6% after June 1, 1969. The price of R-12 was reduced 3.1% after June 1, 1969, and the majority maintains that the contract prices should be reduced accordingly.

I disagree with this portion of the opinion and contend that the Price Reductions Clause was designed to ensure that the Government should not pay a price higher than the general market value, and the clause was not intended to compel a contractor to reduce his price still further below the general market level.

'34. PRICE REDUCTIONS

(This Price Reductions clause is applicable only to requirements contracts and indefinite quantity contracts.) (a) If at any time after the date of the bid or offer the Contractor makes a general price reduction in the comparable price of any article or service covered by the contract to customers generally, an equivalent price reduction based on similar quantities and/or considerations shall apply to the contract for the duration of the contract period (or until the price is further reduced). Such price reduction shall be effective at the same time and in the same manner as the reduction in the price to customers generally. For purpose of this provision, a 'general price reduction' shall mean any horizontal reduction in the price of an article or service offered (1) to Contractor's customers generally, or (2) in the Contractor's price schedule for the class of customers; i.e., wholesalers, jobbers, retailers, etc., which was used as the basis for bidding on this contract. (For purposes of determining a 'general price reduction' under this clause, sales to States, including the District of Columbia, and other political subdivisions by a Contractor, or reductions in price schedules of the Contractor to such agencies, shall have no application.) An occasional sale at a lower price, or sale of distressed merchandise at a lower price, would not be considered a 'general price reduction' under this provision. The Contractor shall invoice the ordering offices at such reduced prices indicating on the invoice that the reduction is pursuant to the 'Price Reductions' article of the contract provisions. The contractor, in addition, shall within 10 days of any general price reduction notify the General Services Administration's Contracting Officer of such reduction by letter. Failure to do so may require termination of the contract, as provided in the 'Default' clause of the General Provisions. Upon receipt of any such notice of a general price reduction all ordering offices will be duly notified by the Contracting Officer.'

I must take issue with the majority statement: 'We are particularly reluctant to speculate on what the drafters of the Price Reductions clause may have intended when the record before us is devoid of any evidence on that point.' The clause itself is ample evidence of what the drafters intended, and a careful study of its language and phrasing is the only basis on which the Board should make this determination.

The clause contains the statement: 'If at any time after the date of the bid or offer the Contractor makes a general price reduction in the comparable price of any article or service covered by the contract to customers generally, an equivalent price reduction based on similar quantities and/or considerations shall apply to the contract . . .' (emphasis added). In this instance, the article or service is 'comparable' or 'similar,' but the 'price' or 'consideration' is definitely not 'similar' or 'comparable.' The contract price is well below the price sold to customers generally, and I believe should not be subject to a further reduction.

The clause further defines a 'general price reduction' as 'any horizontal reduction in the price of an article or service offered (1) to Contractor's customers generally, or (2) in the Contractor's price schedule for the class of customers; i.e., wholesalers, jobbers, retailers, etc., which was used as the basis for bidding on this contract.' As the majority admits, the contractor's price schedule, in this instance, was not used as a basis for bidding on this contract, since there is no relationship between contract and catalogue prices in that contract prices are substantially lower than those shown in the catalogue. Furthermore, the reduction asked for by the Government was never offered to 'customers generally.'

In interpreting a contract, it is often as important to note omissions as well as inclusions. Nowhere does this clause mention the application of a price reduction to a contract price which is below the general market level. The only reference to a sale below the general market level is: 'An occasional sale at a lower price, or sale of distressed merchandise at a lower price, would not be considered a 'general price reduction' under this provision.' The assumption is that the contractor selling at the general market level will not be obligated to reduce his price because of an 'occasional sale at a lower price.' In this instance, it is the contractor who made the sale to the Government at a lower price, and one cannot logically read into the contract instructions that such a contractor should be forced to make further price reductions.

However, even assuming arguendo, that the clause does apply to a contractor whose price is below the general market level, the clause still does not describe how the reduction is to be computed. The phrase 'equivalent reduction' does not specify whether the reduction should be made by percentages or by actual cent per pound of the general price reduction. In this case, for example, the contract price of a 50-pound canister of R-22 was $.404 a pound. The catalogue price for a similar canister was reduced 6.5% after April 1, 1969, from $.775 or by $.05 per pound. Should the $.404 contract price then be reduced by $.05 a pound or by 6.5% of $.404, which is roughly $.026 a pound? The phrase 'equivalent reduction' is entirely too vague if intended to describe reductions in contract prices which are already below the general market level. The phrase is meaningful and specific only when it can be applied to a contract price which is the same as the general market price.

It is both reasonable and equitable to determine that the Price Reductions Clause does not apply to a contractor selling below the general market level.

The reverse interpretation would severely penalize the contractor who offers his product to the Government at a price below the general market level, and in this case would force him to sell below cost, and would work to the advantage of the contractor whose bid was at the general market level. This cannot have been the intent of the contract draftsmen. The majority contends that while its interpretation may not be equitable, the Board is not empowered to reform the contract. I maintain that the contract does not need reformation but correct interpretation.

The majority has offered several reasons why a contractor should be able to sell his product to the Government at a lower cost than to other commercial customers. This is not an issue for the Board to decide. The issue here is whether the contractor is obligated, under Clause 34, to make a further reduction in his prices.

To summarize my position, I maintain that the purpose of the Price Reductions Clause is to ensure that the Government will not be charged more than the general market level in the event of a general price reduction and maintain that its purpose is not to force a contractor to reduce a price below market level still lower and also maintain that price reduction should not be allowed for the following reasons:

1. The prices in the contract and the catalogue are neither similar nor comparable.

2. The contractor's catalogue prices were not used as a basis for bidding on the contract nor did the contractor ever offer to customers generally the price reductions which are being asked for by the Government.

3. The contract does not specify that reductions must be made where prices are below the general market level.

4. 'Equivalent price reduction' is too vague a term when applied to prices below the general market level.

5. To interpret this clause as applying to prices below the general market level is illogical in that the clause would then penalize low bidders.

Accordingly, I respectfully dissent.

Robert B. James, Jr., Member
1972 WL 1553 (G.S.B.C.A.), 73-1 BCA P 9789, GSBCA No. 3628

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United States District Court,
D. Minnesota.

HEAVEN & EARTH, INC., Plaintiff,
v.
WYMAN PROPERTIES LIMITED PARTNERSHIP and United Properties, L.L.C., Defendants.

No. Civ. 03-3327(DWF/SRN.

Oct. 21, 2003.

Background: Commercial building lessee brought action against lessors, stemming from dispute involving utility charges.

Holdings: On lessors' motion to dismiss for failure to state claims, the District Court, Frank, J., held that:
(1) lessee properly stated claims for breach of contract, conversion, and common law fraud;
(2) lessee failed to state claim under Minnesota Consumer Fraud Act; and
(3) lessee properly stated RICO claim.

Motion granted in part, and denied in part.

[1] Landlord and Tenant ⚷124(3)

233k124(3) Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged that lease language concerning separately metered electrical costs and reimbursements demonstrated intention for leases to act as pass-through of electrical charges, as required to state claims for breach of contract and conversion under Minnesota law.

[2] Fraud ⚷20
184k20 Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged that it relied upon material misrepresentations regarding calculation of electrical charges made by lessors via oral representations, monthly billing statements, and correspondence, as required to state common law fraud claim under Minnesota law.

[3] Consumer Protection ⚷33
92Hk33 Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, failed to allege that its action would benefit public, as required to maintain claim under Minnesota Consumer Fraud Act (CFA), since lessors' purported misrepresentations were made only to lessee and other tenants. M.S.A. § 8.31; M.S.A. § 325F.69.

[4] Limitation of Actions ⚷179(2)
241k179(2) Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged that lessors fraudulently concealed violation of lease language concerning electrical costs and reimbursements, and that it exercised due diligence in investigating its claim, as required to toll statute of limitations for bringing claim under under Racketeer Influenced and Corrupt Organizations (RICO) Act; complaint averred that, in response to lessee's requests for information, lessors claimed that higher charges at issue were pass-through fees billed by utility company. 18 U.S.C.A. § 1962.

[5] Racketeer Influenced and Corrupt Organizations ⚷31
319Hk31 Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged multiple distinct injuries resulting from lessors' purported acts of mail fraud, as required to state Racketeer Influenced and Corrupt Organizations (RICO) Act claim; complaint averred series of misrepresentations, occurring in part by correspondence, regarding lessors' calculation of electrical bills. 18 U.S.C.A. § 1962.

[6] Postal Service ⚷35(10)
306k35(10) Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged underlying mail fraud cause of action, as required to state Racketeer Influenced and Corrupt Organizations (RICO) Act claim; complaint averred that lessors used United States Postal Service in delivery of allegedly fraudulent billing statements and letter. 18 U.S.C.A. § 1341; 18 U.S.C.A. § 1962.

[7] Racketeer Influenced and Corrupt Organizations ⚷28
319Hk28 Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged that lessors' purported racketeering activities manifested both relatedness and continuity, as required to state Racketeer Influenced and Corrupt Organizations (RICO) Act claim; complaint averred that lessors' oral and written misrepresentations regarding calculation of electrical bills were undertaken to defraud all building tenants, and that such activities were accomplished by common method. 18 U.S.C.A. § 1962.

[8] Racketeer Influenced and Corrupt Organizations ⚷62
319Hk62 Most Cited Cases

Commercial building lessee who brought action against lessors, stemming from dispute involving utility charges, properly alleged that lessors' purported creation and mailing of fraudulent billing statements and false statements regarding calculation of electrical bills were direct causes of lessee's damages, as required to state Racketeer Influenced and Corrupt Organizations (RICO) Act claim; complaint averred facts sufficient to establish that injury suffered by lessee occurred by reason of underlying mail fraud and breach of contract claims. 18 U.S.C.A. § 1962.

Andrew L. Marshall, Bassford Remele, Minneapolis, Minnesota, on behalf of Plaintiff.

Bradley J. Gunn, and Lisa Pritchard Bayley, Leonard, Street and Deinard, Minneapolis, Minnesota, Jeffrey E. Grell, Ricoact.com L.L.C. , Edina, Minnesota, on behalf of Defendants.

MEMORANDUM OPINION AND ORDER

FRANK, J.

Introduction

*1 The above-entitled matter came on for hearing before the undersigned United States District Judge on October 1, 2003, pursuant to a Motion to Dismiss brought by Defendants Wyman Properties Limited Partnership ("Wyman") and United Properties, L.L.C. ("United"). By its complaint, Plaintiff Heaven & Earth, Inc. ("HEI" or "Plaintiff") alleges a civil violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c); a civil RICO conspiracy, 18 U.S.C. § 1962(d); fraud; breach of contract; consumer fraud; and conversion. Wyman and United (collectively, "Defendants") bring the current motion seeking to dismiss the complaint against them, contending that Plaintiff failed to plead a claim for breach of contract. Defendants assert that Plaintiff has not pled an actionable fraud claim because any allegedly fraudulent statements made were immaterial and did not cause Plaintiff any injury. Defendants also assert that the consumer fraud claim fails because it has not been brought to benefit the public. Defendants' final argument is that the civil RICO claims should be dismissed as barred by RICO's four-year statute of limitations, or, in the alternative, that Plaintiff was not injured "by reason of" a pattern of racketeering activity. For the reasons stated below, the Court denies Defendants' Motion to Dismiss except with regard to the consumer fraud count of the complaint.

Background

On May 21, 1990, HEI and Wyman entered into a lease ("the 1990 Lease") for the first and second floors of the Wyman Building ("the Leased Property"). (*See* Compl. at ¶ 6.) The Leased Property is located at 110 5th Street North, Minneapolis, Minnesota. (*See id.*)

The Leased Property was managed by Eberhardt Property Management Company ("Eberhardt") until 1994. (*See id.*) In 1994, Eberhardt was purchased by United. (*See id.*) Brian Burg was employed as property manager for the Leased Property in 1992 and continued in that position for United once it completed its purchase of Eberhardt. (*See* Compl. at ¶ 7.)

The 1990 Lease contained the following provision:

> 7. *UTILITY EXPENSE.* Tenant shall timely pay when due for all utilities, including water, gas, electricity, telephone and other utility services used by it, whether or not separately metered; and in the event Tenant shall not pay the same when due, Landlord may, but shall not be obligated, to pay the same on behalf of the Tenant, and Tenant shall reimburse Landlord therefor, promptly upon demand. Utility payments hereunder shall be deemed to be additional rent.

(Compl., Ex. A, ¶ 7).

The same day the parties entered into the 1990 Lease, they also executed an addendum to the 1990 Lease ("the 1990 Addendum"). (*See* Compl., Ex. A.) Paragraph 4 of the 1990 Addendum states:

> 4. Rent during the initial Term and any renewal Term shall be considered "gross rent" with the exception that Tenant shall pay, in addition to Rent: (i) Tenant's separately metered electrical costs, (ii) all costs attributable to Tenant's maintenance obligations hereunder, (iii) all costs attributable to Tenant's insurance costs hereunder and (iv) if water to the Premises is submetered, Tenant's water usage as submetered to the Premises.

***2** (Compl., Ex. A, ¶ 4).

On November 26, 1996, the parties entered into a second lease ("the 1996 Lease"). (*See* Compl. at ¶ 11). The 1996 Lease provided that with regard to the utility payments:

> 8. SERVICES AND UTILITIES.
>
> a. *Utility Expense.* Tenant shall timely pay when due for all utilities, including water, gas, electricity, telephone and other utility services used by it, whether or not separately metered; and in the event Tenant shall not pay the same when due, Landlord may, but shall not be obligated, to pay the same on behalf of Tenant, and Tenant shall reimburse Landlord therefore, promptly upon demand. Utility payments hereunder shall be deemed to be additional rent.

(Compl., Ex. B, ¶ 8).

From 1990 until the present, HEI has received monthly billing statements from Defendants for rent and associated charges. (*See* Compl. at ¶ 9.) The billing statements refer to charges for electrical usage as "electrical reimbursement." HEI alleges it contacted Burt Corwin ("Corwin"), Wyman's President, and Burg about the high cost of electricity on several occasions, and that Defendants represented to HEI that the electrical charges were exactly those being paid by Defendants to NSP/Excel. (*See id.* at ¶ 16.)

In a letter dated November 7, 1997, Burg responded to HEI's request for additional information concerning the billing of electrical services ("the Burg letter"). The Burg letter states:

> There is a consumption charge for electricity measured through the meter. This is a charge for electricity actually delivered to your suite. It is charged to the customer at seasonally adjusted rates; there is a different rate charge per kilowatt hour (kwh) between May and October than is used through November and April. NSP charges more for power in the summer than in the winter; the costs of power generation are greater then. We pass those charges through to you; we use the same rate as NSP does. Currently they are .073/kwh during the summer months and .063/KWH during the winter months.

(Compl. at ¶ 17 (emphasis omitted)).

In July 2000, HEI brought suit against Wyman over a lease option extending HEI's lease of the Leased Property. (*See id.* at ¶ 20 .) During a deposition held on September 18, 2001, Burg stated that he did not believe that Defendants made any profit on the electrical charge. (*See id.*) The next day Burg sent a letter to HEI's counsel informing HEI's counsel that he had discussed the matter with Corwin and had learned that tenants of the Wyman Building were charged at a higher unit cost to the tenant than Wyman is itself charged by the utility. (

See id. at ¶ 21.) In March 2002, HEI took Burg's deposition a second time. (*See* Compl. at ¶ 22.) HEI alleges that it was only then that it became fully aware of the extent of Defendants' mark-up of electrical charges. HEI alleges that while it was being billed 7.3 cents per kilowatt hour, the actual cost to Defendants from NSP/Excel was 2.84 cents per kilowatt hour. (*See id.* at ¶ 18.) HEI further alleges that as a result of the alleged overbilling of electrical charges HEI paid in excess of $200,000 to Defendants that Defendants were not due under the leases. (*See id.* at ¶ 25.)

Analysis

1. Motion to Dismiss Standard

*3 In deciding a motion to dismiss, the Court must assume all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir.1986). The Court grants a motion to dismiss only if it is clear beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. *Id.* The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The Court need not resolve all questions of law in a manner which favors the complainant; rather, the Court may dismiss a claim founded upon a legal theory which is "close but ultimately unavailing." *Id.* at 327.

2. Breach of Contract

The construction and effect of a contract is a question of law unless the contract is ambiguous. *See Turner v. Alpha Phi Sorority House,* 276 N.W.2d 63, 66 (Minn.1979). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Denelsbeck v. Wells Fargo & Co.,* 666 N.W.2d 339, 346 (Minn.2003) (quoting *Art Goebel, Inc. v. N. Suburban Agencies, Inc.,* 567 N.W.2d 511, 515 (Minn.1997)). The determination of whether a contract is ambiguous is a question of law. *See Goebel,* 567 N.W.2d at 515. If a contract is unambiguous, the contract must be given its plain and ordinary meaning. *See Denelsbeck,* 666 N.W.2d at 347 (citations omitted).

[1] Defendants argue that the terms of the leases are clear and do not limit their ability to charge more for electricity than was charged to them by NSP/Excel. Defendants argue that the "reimbursement" language contained in the leases was only applicable under a scenario whereby Plaintiff would be directly billed by NSP/Excel, but would fail to make its payments. Under such a scenario, Defendants claim that the language in the leases would allow Defendants to pay NSP/Excel for the electricity used by Plaintiff and to recover any such payments made from Plaintiff. Further, Defendants ask the Court to dispose of the conversion claim based on terms of the contract.

Like Defendants, Plaintiff contends that the terms of the leases are clear; however, Plaintiff asserts that the leases only allowed Defendants to bill Plaintiff for the actual cost of the electrical charge as paid by Defendants to NSP/Excel. Plaintiff argues that the language in the leases concerning "separately metered electrical costs" and reimbursements show that both parties intended the leases to act as a pass-through of electrical charges.

The Court finds that Plaintiff has made a colorable claim of breach of contract and thus declines to grant Defendant's motion to dismiss with regards to Plaintiff's breach of contract and conversion claims.

3. Fraud

A. Common Law Fraud

The elements of a common law fraud action are: (1) a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) the party suffer a pecuniary damage as a result of the reliance. *See Specialized Tours, Inc. v. Hagen,* 392 N.W.2d 520, 532 (Minn.1986) (citations omitted).

*4 Defendants argue that Plaintiff's common law fraud claim should be dismissed because the allegedly false statements were immaterial, and Plaintiff suffered no pecuniary loss as a result of any reliance it placed on those statements. Defendants argue that any false statements regarding the rate it was billed for electrical charges were immaterial, because Defendants were under no contractual obligation to maintain prices at that level. Defendants also assert that even if the lease had obligated them to pass along the electrical charges directly to Plaintiff, the statements would not have caused any damage beyond that caused by the breach of contract.

Plaintiff, on the other hand, alleges that Defendants made material misrepresentations concerning the prices of electricity in oral representations made in the Defendants' monthly billing statements and in the Burg letter. Plaintiff alleges that Defendants were aware of the falsity of those statements when they were made and that its reliance on those statements resulted in it suffering pecuniary harm.

[2] The Court finds that Plaintiff has properly alleged a common law fraud claim against Defendants. Plaintiff has asserted that Defendants made material misrepresentations regarding the calculation of electrical charges via oral representations, monthly billing statements, and the Burg letter. In addition, Plaintiff has asserted that it relied on the monthly billing statements to its detriment because the billing statements led Plaintiff to pay Defendants more than Defendants were due under the leases. Finally, Plaintiff has alleged that the oral representations and the Burg letter contained fraudulent statements and that those fraudulent statements concealed Defendants' alleged overbilling of Plaintiff, Based on these allegations, the Court finds that the Plaintiff has alleged the requisite elements of a common law fraud claim.

B. Consumer Fraud Act ("CFA") Claim

The CFA provides, in relevant part, as follows:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided therein.

Minn.Stat. § 325F.69, subd. 1.

An individual bringing a claim under the CFA must do so through the Private Attorney General Statute, Minn.Stat. § 8.31. *See Behrens v. United Vaccines, Inc., Div. of Harlan Sprague Dawley, Inc.* ., 228 F.Supp.2d 965, 968 (D.Minn.2002). Individuals bringing a claim through the Private Attorney General Statute must "demonstrate that their cause of action benefits the public." *Ly v. Nystrom,* 615 N.W.2d 302, 314 (Minn.2000).

Defendants contend that Plaintiff's claim for damages under the CFA should be dismissed because the alleged misstatements were not made to the public and resolution of the suit would not have any broader implications than between the parties to the suit. Defendants also assert that any damages suffered by Plaintiff occurred solely as the result of the alleged breach of contract and not as the result of any alleged misrepresentations.

***5** Plaintiff asserts that the issue of whether the claim affects the public interest is one of fact that cannot be decided by the Court at this time. Plaintiff further argues that the suit is in the public's interest, because it is likely to force Defendants to cease their activities not only with regard to Plaintiff, but also as to the other tenants of the Wyman Building.

As a preliminary matter, the Court finds that the issue of whether the matter is in the public interest is a question of law, not a question of fact as Plaintiff contends. Plaintiff cites no cases to support its assertion, nor is the Court able to find such a case. [FN1] In considering whether the Plaintiff's suit is in the public's interest, the Court looks to recent cases for guidance. In *Ly v. Nicestrom,* 615 N.W.2d 302 (Minn.2000), the Supreme Court of Minnesota held that the claimant's suit did not benefit the public, because the claimant was defrauded in a "single one-on-one transaction." *Id.* at 314. In *Flora,* the court went even farther in finding that the claimant's suit did not benefit the public where only "a finite group of shareholders and option holders" were involved in the alleged fraud. *Id.* at 788. In contrast, in *Collins v. Minn. Sch. of Business, Inc.,* 636 N.W.2d 816, 821 (Minn.Ct.App.2001), the Minnesota Court of Appeals held that the claimants had shown a benefit to the public, because the fraud occurred in advertising that was presented to the public. *See id.* at 788.

FN1. In *Flora v. Firepond, Inc.*, 260 F.Supp.2d 780 (D.Minn.2003), the court dismissed a claim brought under the CFA on a motion for a judgment on the pleadings under Rule 12(c). *See id.* In that case, the court stated that a Rule 12(c) motion differs from a motion to dismiss for failure to state a claim under Rule 12(b)(6), but also noted that "the standards for dismissal under each are similar." *Id.* at 784 (citing *Allstate Fin. Corp. v. U.S. Postal Service,* 860 F.Supp. 653, 655 (D.Minn.1994)).

[3] The Court finds that the facts of *Ly* and *Flora* are more applicable to the claim at issue here. Like *Ly,* the Plaintiff in this case brought suit based on misrepresentations made to it in relation to a one-on-one transaction. Here, the misrepresentations alleged were made only to Plaintiff and possibly to a group of other tenants. In addition, like *Flora,* the benefits of a suit will extend only to Plaintiff and potentially to a finite group of tenants. Because the alleged misrepresentations were made in a one-on-one transaction and Plaintiff cannot prove that its action would benefit the public, the Court grants Defendants' motion to dismiss Plaintiff's CFA claim.

4. Racketeer Influenced and Corrupt Organizations ("RICO") Act Claims

The RICO Act, 18 U.S.C. § 1961, *et seq.*, states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "A violation of § 1962(c) ... requires: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

A. Statute of Limitations

Civil RICO claims are governed by a four-year statute of limitations. *See Association of Commonwealth Claimants v. Moylan,* 71 F.3d 1398, 1402 (8th Cir.1995). The four-year statute of limitations for civil RICO claims does not begin to run until plaintiff discovers or should have discovered its injury. *See Rotella v. Wood,* 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). The statute of limitations can be tolled if the plaintiff is able to show that there was fraudulent concealment of the violation and that the plaintiff exercised due diligence to discover the claim. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997).

***6** Defendants present several arguments to support their contention that Plaintiff's civil RICO claim is time-barred by the four-year statute of violations. Defendants begin by asserting that Plaintiff has not established either the fraudulent concealment or due diligence requirements, and therefore, that the claim is barred. Defendants argue that Plaintiff had constructive notice of the facts constituting its claim no later than November 7, 1997. In support of this assertion, Defendants argue that once Plaintiff received the Burg letter, Plaintiff had sufficient facts upon which to conduct an investigation of the electrical charges. Defendants argue that Plaintiff failed to exercise due diligence in investigating these facts, and, as a result, the claim is barred by the statute of limitations.

[4] The Court rejects Defendants' arguments and finds that Plaintiff has alleged sufficient facts to constitute fraudulent concealment of the violation. In addition, Plaintiff has established that it investigated the facts underlying the claim with due diligence. Plaintiff asserts that it contacted Defendants on a number of occasions about the electrical charges. In response to Plaintiff's requests for information, Defendants allegedly told Plaintiff that the electrical charges were a pass-through of the charges as billed by the utility company. Both the Burg letter and Burg's initial deposition testimony had the effect of concealing the actual billing amounts from Plaintiff. Plaintiff had concerns about what it perceived to be higher than expected electrical charges and acted reasonably in requesting information regarding those charges from Defendants. Once Plaintiff received Defendants' response to its inquiries, Plaintiff alleges that it relied on those responses to its detriment. Thus, the Court finds Plaintiff has

alleged fraudulent concealment of the claim and Plaintiff exercised due diligence in investigating the claim.

Defendants also argue that any damages suffered by Plaintiff occurred as a result of one cognizable pattern of conduct as opposed to multiple independent injuries. Defendants cite to *Klehr v. A.O. Smith Corp.,* 87 F.3d 231 (8th Cir.1996), for support of their assertion that any injuries suffered by Plaintiff occurred once the pattern of conduct began. According to Defendants' theory, Plaintiff suffered an injury once Defendants allegedly violated their contractual obligation to charge Plaintiff the same rate for electricity as Defendants paid for the electrical charges. Any alleged misrepresentations that followed the violation of the leases was part of "one, single continuous injury." *Klehr,* 87 F.3d at 239 (8th Cir.1996).

Plaintiff, on the other hand, contends that it suffered multiple distinct injuries as a result of the allegedly fraudulent billing statements. Plaintiff differentiates *Klehr* from this case by pointing out that *Klehr* involved only a single transaction-the purchase of a silo from the defendant. All of the damages claimed by plaintiff in *Klehr* arose from the purchase of the silo and the silo's failure to operate as advertised. Plaintiff argues that while some of the alleged misrepresentations in *Klehr* took place after the transaction, they all related to the same transaction and injury.

*7 In addition, Plaintiff contends that its position is further supported by the decision of the Court of Appeals for the Seventh Circuit in *Liquid Air Corp. v. Rogers,* 834 F.2d 1297 (7th Cir.1987). In *Liquid Air,* the Seventh Circuit had to determine whether a RICO violation could be based on a single scheme with multiple counts of mail and wire fraud. The Seventh Circuit held that defendants had committed a separate act of fraud each time it submitted a false invoice because each invoice deprived plaintiff of property. The Seventh Circuit distinguished between cases where several misrepresentations were necessary to inflict a single harm and those cases like *Liquid Air* where "[e]ach invoice represented a discreet attempt to defraud Liquid Air and had little to do with the previous or subsequent false invoices." *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.,* 63 F.3d 516, 524 (7th Cir.1995).

[5] Here, the Court finds that Plaintiff's complaint alleges multiple distinct injuries. The Court agrees that the facts in *Klehr* differentiate that case from the case presently before this Court. In *Klehr,* the court was considering a single transaction and a series of misrepresentations that were made both before and after the transaction took place. All of the misrepresentations present in that case were aimed at concealing the facts of the initial transaction. Here, Plaintiff has alleged a series of alleged misrepresentations, each of which resulted in a distinct injury to Plaintiff. On this issue, the Court finds persuasive the Seventh Circuit's ruling in *Liquid Air,* where the court found that each false invoice was a separate attempt to defraud plaintiff of its property.

In summary, the Court finds that the statute of limitations for Plaintiff's civil RICO claim began running on September 19, 2001. Plaintiff has alleged sufficient information to support its claim that Defendants concealed the facts upon which the civil RICO claim is based and that Plaintiff exercised reasonable diligence in investigating the matter. Further, Plaintiff has alleged multiple distinct injuries resulting from Defendants' alleged acts of mail fraud.

B. Racketeering Activity

"Racketeering activity" is expressly defined by RICO to mean any act indictable under certain provisions of Title 18 of the United States Code. 18 U.S.C. § 1961(1)(B). In this case, RICO liability is predicated on alleged acts of mail fraud, 18 U.S.C. § 1341. Mail fraud consists of "the foreseeable use of the mails or wires for the purpose of carrying out a scheme to defraud." *Abels v. Farmers Commodities Corp.,* 259 F.3d 910, 918 (8th Cir.2001) (citing *Atlas Pile Driving Co. v. DiCon Fin. Co.,* 886 F.2d 986, 991 (8th Cir.1989)). The crime of mail fraud is broad in scope and "its fraudulent aspect is measured by a non-technical standard, condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair play." *Atlas Pile Driving,* 886 F.2d at 991. "Even routine business communications may be sufficient to make a scheme of false dealing a federal offense." *Id.* at 992.

***8** Defendants assert that the 1990 and 1996 Leases cannot serve as the basis for an alleged pattern of mail fraud, because breach of contract is not fraud. Defendants cite several cases in which courts have held that breach of contract claims are insufficient to support a finding of fraud that can form the basis for a RICO violation. In particular, Defendants rely on *Renaissance Center Venture v. Lozovoj,* 884 F.Supp. 1132 (E.D.Mich.1995) (*"RCV"*), which they claim is "nearly identical" to the case before this Court.

Plaintiff rebuts much of the argument put forth by Defendants by restating its position that the basis for the RICO action is mail fraud and not the alleged breach of contract. Plaintiff has alleged Defendants were aware of the approximate energy usage of the leased property, and the cost of that usage, but that Defendants conspired to charge Plaintiff almost twice that amount. In carrying out their alleged scheme, Defendants used the U.S. Postal Service to deliver billing statements that stated that the charges to Plaintiff and other tenants of the Wyman Building were merely "reimbursements" for charges paid out by Defendants. Plaintiff also relies on language in the Burg letter that stated Defendants only pass through charges paid by them to NSP/Excel.

The Court finds that Defendants' reliance on the *RCV* case is misplaced. In *RCV,* the issue was whether defendants violated a lease agreement by failing to separately meter leased space. The *RCV* court held that defendants had not violated the lease because the lease itself did not call for such an arrangement. The court also held that plaintiffs had been unable to prove any damages as the energy costs had been divided amongst the lessees based on a formula created by an independent engineering firm that used objective factors to determine the lessees' energy usage. Finally, the court held that the information as to how the electrical charges were calculated was clearly outlined in the monthly billing statements sent out to plaintiffs. Here, no such formula or objective calculation was in place.

[6] Here, the Court finds that Plaintiffs have pled a claim of mail fraud sufficient to support a claim for a RICO violation. Plaintiff clearly based its mail fraud claim on the Defendants' use of the U.S. Postal Service in the delivery of the allegedly fraudulent billing statements and the Burg letter. The cases cited by Defendants for their assertions that an inference of fraud cannot be supported solely by a breach of contract action do not address the claims actually presented by Plaintiff. Therefore, the Court finds that Plaintiff has alleged sufficient instances of mail fraud to serve as the basis for a civil RICO claim.

C. Pattern of Racketeering Activity

RICO's language specifically requires that a plaintiff establish a pattern of racketeering activity. *See United Healthcare Corp. v. American Trade Ins. Co., Ltd.,* 88 F.3d 563, 571 (8th Cir.1996). The language of RICO implies that while two acts are necessary, they may not be sufficient to constitute a pattern of racketeering activity. *See United Healthcare,* 88 F.3d at 571 (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 237, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)).

***9** A pattern of racketeering activity is present only when predicate acts are linked by continuity plus relationship. *See Handeen v. Lemaire,* 112 F.3d 1339, 1353 (1997) (quoting *H.J. Inc. v. Northwestern Bell Tel.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)). The Supreme Court has referred to continuity as both a closed and open-ended concept that is principally temporal in nature. *See Handeen,* 112 F.3d at 1353 (quoting *H.J., Inc.,* 492 U.S. at 241). A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. *See Handeen,* 112 F.3d at 1353 (quoting *H.J., Inc.,* 492 U.S. at 242). In the alternative, the predicates may satisfy the definition of open ended continuity to the extent that they involve a distinct threat of long-term racketeering activity. *Handeen,* 112 F.3d at 1353 (quoting *H.J. Inc.,* 492 U.S. at 242).

Defendants argue that the "acts relied upon by HEI are disjointed in time and sporadic in nature and posed 'no threat of continued criminal activity." ' Defendants also assert that Plaintiff must show that the acts of mail fraud were a regular way of conducting the Defendants' ongoing business. Plaintiff responds by restating its allegation that the fraudulent billing statements were sent out on a monthly basis for a period of over 10 years as a part of Defendants' regular business activities.

[7] The Court finds that Plaintiff has adequately pled that Defendants' racketeering activities manifested both relatedness and continuity. Plaintiff alleged that these activities were undertaken to defraud tenants of the Wyman Building and that these activities were accomplished by a common method-the fraudulent billing statements. These activities took place as part of Defendants' regular business practice and therefore clearly demonstrate continuity. Accordingly, Plaintiff has properly alleged injury by reason of a pattern of racketeering activity.

D. Causation and Damages

Section 1964(c) of the RICO provides that any person "injured in his business or property by reason of a violation of section 1962" may sue for treble damages. 18 U.S.C. § 1964(c). "The Supreme Court has construed the 'by reason of' language to incorporate the traditional requirements of proximate or legal causation, as opposed to mere factual or 'but for' causation." *Bieter Co. v. Blomquist,* 987 F.2d 1319, 1325 (8th Cir.1993) (quoting *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)). In the context of RICO, "proximate causation requires 'some direct relation between the injury asserted and the injurious conduct alleged." ' *United Healthcare Corp. v. American Trade. Ins. Co., Ltd.,* 88 F.3d 563 (quoting *Holmes,* 503 U.S. at 268).

Defendants contend that Plaintiff did not suffer any damages "by reason of" the acts of racketeering alleged in the Complaint. Defendants argue that any damages that were suffered by Plaintiff arose out of the alleged breach of contract as opposed to the alleged mail fraud. Defendants contend that the alleged mail fraud merely delayed the bringing of the breach of contract action. Defendants propose that the appropriate manner in which to deal with the delay is to allow Plaintiff to recoup its losses by way of an award of prejudgment interest. Finally, Defendants assert that if the Court dismisses the RICO action, the Court should likewise dismiss the conspiracy to violate the RICO claim, 18 U.S.C. § 1962(d), because Plaintiff has not alleged the elements of the RICO claim.

***10** Plaintiff argues that the creation and mailing of the fraudulent billing statements and the false statements made by Defendants are the direct cause of Plaintiff's damages. Plaintiffs rely heavily on *Louisiana Power and Light Co. v. United Gas Pipe Line Co.,* 642 F.Supp. 781 (E.D.La.1986), for support of its assertion that a plaintiff can suffer injury "by reason of" mail fraud sufficient to maintain a RICO action where the facts alleged may also constitute a breach of contract claim.

[8] The Court finds that the alleged mail fraud that forms the basis for the civil RICO claim was a factor in causing Plaintiff's injury. The damages allegedly suffered by Plaintiff occurred not only as the result of the breach of contract, but also as a result of Defendants' misrepresentations. Based on the reasons previously stated, the Court denies Defendants' motion to dismiss the civil RICO claim. In addition, the Court denies Defendants' motion to dismiss the conspiracy to violate RICO claim, because the elements of this claim have been properly alleged.

Conclusion

Based on the foregoing, the submissions of the parties, and all of the files, records, and proceedings herein, IT IS HEREBY ORDERED:

1. Defendants' Motion to Dismiss (Doc. No. 2) is GRANTED IN PART and DENIED IN PART, as follows:

a. Defendants' Motion to Dismiss Count Five (Consumer Fraud) of Plaintiff's Complaint is GRANTED. Count Five of the Complaint is DISMISSED WITH PREJUDICE.

b. Defendants' Motion to Dismiss Counts One through Four and Count Six of the Complaint is DENIED.

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